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Clerk.

Worthington v Pemberton Jr

Supreme Court of the United States.

Appellee Pemberton

OCTOBER TERM, 1900.

Filed Mar 7, 1901

No. 176.

GEORGE H. N. LUHRS, APPELLANT,

vs.

WILLIAM A. HANCOCK, LILLY B. HANCOCK, AND THOMAS W. PEMBERTON.

Appellee,

BRIEF FOR [redacted], THOMAS W. PEMBERTON.

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STATEMENT OF THE CASE.

This is an appeal from the judgment of the supreme court of the Territory of Arizona affirming a judgment of the district court of the third judicial district of Arizona in an action of ejectment brought by the appellant, George H. N. Luhrs, against the appellees, William A. Hancock, Lilly B. Hancock, his wife, and Thomas W. Pemberton, to recover possession of certain lots in the city of Phœnix, Arizona.

This action was first brought by the appellant against Hancock and wife (who were then in possession of the

premises in question) on February 1, 1896. Pemberton was made an additional defendant on March 4, 1898, he having been put in possession of the premises by the sheriff on March 5, 1896, and having remained in sole possession of them since the latter date.

The case was tried by consent by the court without a jury (Rec., p. 12). The trial court made the following findings of fact and conclusions of law:

"*Findings of Fact.*

"The court finds that all of the parties to this action are residents of Maricopa county, Arizona Territory.

"2. The court finds that the said defendants, William A. Hancock and Lilly B. Hancock, were on the 27th day of February, 1886, the owners of the property described in the plaintiff's complaint herein, to wit, lots fourteen (14), fifteen (15), sixteen (16), seventeen (17), eighteen (18), in block seventy-seven (77), of the city of Phœnix, Arizona, and that said property was then and had been for a long time prior thereto the homestead of said defendants, William A. Hancock and Lilly B. Hancock.

"That on said 27th day of February, 1886, the said defendant, William A. Hancock, in consideration of love and affection and as a settlement of a portion of his property on his wife, the defendant Lilly B. Hancock, conveyed to his said wife, Lilly B. Hancock, said property, which deed of conveyance was on the 6th day of March, 1886, duly recorded in the office of the county recorder of Maricopa county, in volume 12 of Deeds, page 359 thereof; that said conveyance did not impair the claims of any existing creditors, and that such conveyance and settlement was not intended by the said defendant, William A. Hancock, as a cover to future schemes or fraud; that thereupon the title to said property became and was vested in the said defendant, Lilly B. Hancock, as her sole and separate property.

"3. That thereafter said defendants, William A. Hancock and Lilly B. Hancock, executed a mortgage on said property to one Robert Alstatter; that thereafter said mortgage was foreclosed, said property sold on said foreclosure sale and bid in by the defendant herein, Thomas W. Pemberton,

and thereupon the said Thomas W. Pemberton entered into possession of said property, and was at the time of the commencement of this action against him in possession of said property, claiming to be the owner thereof in fee under and by virtue of said mortgage and the foreclosure proceedings had thereon.

"*Conclusions of Law.*

"As conclusions of law the court finds that the plaintiff, George H. N. Luhrs, did not have at the time of the commencement of this action any right, title, interest, or claim in or to the property described in the complaint herein or any part thereof.

"That the said defendant, Thomas W. Pemberton, was at the time of the commencement of this action and is now the owner in fee-simple of all of said property.

"That the said defendent, Thomas W. Pemberton, should have judgment against the plaintiff, George H. N. Luhrs, declaring his title in said premises good and valid and forever debarring said plaintiff from asserting any claim whatever in or to said lands and premises adverse to the said defendant, Thomas W. Pemberton, and for his costs and disbursements incurred herein, and that the said defendants, William A. Hancock and Lilly B. Hancock, should have judgment against the plaintiff for their costs and disbursements incurred herein."

Final judgment having been rendered in accordance with these findings for the defendant Pemberton (14), the plaintiff Luhrs appealed to the supreme court of the Territory of Arizona (37).

That court affirmed the judgment (90; see opinion by Davis, J., pages 90 to 94) and made the following—

"*Statement of Facts.*

"This was an action by the appellant to recover possession of five certain lots in the city of Phœnix, and for the value of the rents and profits thereof. The complaint is in the usual form in ejectment cases. The defendants William A.

Hancock and Lilly B. Hancock, husband and wife, answered, pleading 'not guilty' and setting up the statute of limitations in bar of the plaintiff's right to recover. Similar defenses were interposed by the defendant Thomas W. Pemberton, who, by way of cross-complaint, also pleaded his ownership and possession of said premises and asked for affirmative relief as against the adverse claims of the plaintiff. Upon the trial in the court below the plaintiff was adjudged to have no right, title, or interest in said property, and the defendant Pemberton was adjudged to be the owner and entitled to the possession thereof. From this judgment of the district court the plaintiff prosecutes an appeal.

"The record shows the material facts in the case to be substantially as follows: On February 27, 1886, the legal title to the premises in controversy was vested in William A. Hancock, the common source from which both the plaintiff and the defendant Pemberton deraign title. The said premises were inclosed as one tract, with a dwelling-house situated upon lots 14 and 15, and had been occupied by the defendants William A. Hancock and Lilly B. Hancock as a homestead ever since 1873. On the said 27th day of February, 1886, and while the said premises were so occupied and claimed as a homestead, the said William A. Hancock, for the consideration of love and affection, deeded the same by a direct conveyance to his said wife, Lilly B. Hancock. The value of the said property so conveyed did not at that time exceed the sum of $4,000.00. On March 5, 1892, certain creditors (Herrick & Luhrs) obtained a judgment in the district court of Maricopa county against the said William A. Hancock for the sum of $2,524.02 upon an indebtedness contracted by him November 1, 1883. An execution was issued upon said judgment April 5, 1892, and the same was levied upon the premises here in controversy as the property of William A. Hancock. No proceeding was had to set aside the anterior conveyance to his wife, but the said real estate was formally sold under said execution to the plaintiff, George H. N. Luhrs, to whom a sheriff's deed was made on February 4, 1893, conveying the title which is the basis of his ejectment suit. On March 21, 1892, the said Lilly B. Hancock and William A. Hancock had borrowed from one Robert Allstatter the sum of $2,600.00, and on the same day, to secure the payment thereof, had executed to

the said Allstatter a mortgage upon all of the aforesaid premises. This mortgage, presumably executed in good faith, was subsequently foreclosed, and the defendant Thomas W. Pemberton became the purchaser at the foreclosure sale. He received the sheriff's deed for the said premises on February 14, 1895, took possession thereof from the Hancocks, and has since paid the taxes and made valuable improvements upon the property. The plaintiff Luhrs was never in the possession of the premises."

"It is hereby certified that the foregoing is a correct statement of the facts as shown by the record in the above-entitled cause" (99).

In accordance with the act of 1874, quoted below, the supreme court of Arizona also made a statement of the rulings of the trial court "on the admission or rejection of evidence" (96 to 98). It will be seen that these rulings raise only the three following questions:

1. Whether the court erred in admitting in evidence the deed from Hancock to his wife, dated February 27, 1886, conveying to her the homestead property in controversy.

2. Whether the court erred in excluding evidence that more than two years after Hancock had so conveyed the homestead to his wife he made application to the United States for other land as a homestead.

3. Whether the court erred in excluding evidence as to whether Hancock's wife was insane on and after the 23d day of March, 1886, that date being more than a month later than the date of the deed to her from her husband.

In the court below the appellant filed sixteen assignments of error (102). In his brief here he assigns ten errors.

The act of Congress approved April 7, 1874 (18 Stat., 27), is as follows:

"That the appellate jurisdiction of the Supreme Court of the United States over the judgments and decrees of said

Territorial courts in cases of trial by jury shall be exercised by writ of error, and in all other cases by appeal, according to such rules and regulations as to form and modes of proceeding as the said Supreme Court have prescribed or may hereafter prescribe:

"*Provided*, That on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below and transmitted to the Supreme Court, together with the transcript of the proceedings and judgment or decree, etc."

This court has held that under this act it is concluded by the findings of fact of the court below, and can consider only such rulings of the trial court as to the admission or rejection of evidence as are certified to it by the supreme court of the State (Harrison *vs.* Perea, 168 U. S., 311; Halloway *vs.* Dunham, 170 U. S., 615; Young *vs.* Amy, 171 U. S., 179).

It will be seen, therefore, that the only assignments of error in the brief for the appellant here which this court will entertain are those numbered respectively 2, 3, and 4.

ARGUMENT.

I.

The deed from Hancock to his wife of March 27, 1886 (66), *was properly admitted in evidence.*

1. The deed was valid because in 1886 it was legal in Arizona for a husband to convey real estate to his wife without the intervention of a trustee.

Appellant contends that this deed from Hancock to his wife, which was made in consideration of love and affection, was void, because at the time it was made the common law was in force in Arizona, and it is claimed that by the common law a husband could not make a deed directly to his wife.

This principle of the common law was founded on the idea that husband and wife were one individual, and hence could not deed from one to the other, as an individual could not deed to himself.

The statute establishing the common law in Arizona, which was in force at the time of this deed from Hancock to his wife (and which is in force now), reads as follows:

Act No. 68, *Laws of Arizona of* 1885.

"The common law of England so far as it is consistent with and adapted to the natural and physical condition of this Territory and the necessities of the people thereof, and not repugnant to, or inconsistent with, the Constitution of the United States, or bill of rights, or laws of this Territory, or established customs of the people of this Territory, is hereby adopted and shall be the rule of decision in all the courts of the Territory."

In 1871 a statute had been enacted in the Territory (and it has been in force ever since, as well as other statutes on the same lines) providing as follows (Compiled Laws 1877, par. 2000):

"Married women, of the age of twenty-one years and upward, shall have the sole and exclusive control of their separate property; and may convey or transfer lands or any estate or interest therein, vested in or held by them in their own right and without being joined by the husband in such conveyance, as fully and perfectly as they might do if unmarried."

This statute and the other laws establishing the rights of married women had entirely done away with the common-law idea that husband and wife were but one individual, and with it the rule arising from it that a husband could not convey directly to his wife, and the statute adopting the common law in Arizona had expressly excluded such principles

as were inconsistent with the laws of the Territory or customs of the people.

No such technical legal rule was in force in Arizona at the time of this transaction. The reasoning of this court in the case of Jones *vs.* Clifton, 101 U. S., 225, is applicable. In that case the court said:

"The technical reasons of the common law, arising from the unity of husband and wife, which would prevent a direct conveyance of the property from him to her, for a valuable consideration, as upon a contract or purchase, have long since ceased to operate in the case of a voluntary transfer of property as a settlement upon her."

The supreme court of Arizona in deciding the present case held that the statute establishing the common law in Arizona has not been construed as requiring that a deed from a husband to his wife is void (92); and as this is largely a question of custom and policy, it would seem to be more a finding of fact than the decision of a question of law.

2. This deed from Hancock to his wife was a valid deed, because at the time this deed was made this property was the homestead of Hancock, and it was at that time legal for a husband to deed a homestead to his wife without his wife signing the deed.

(*a.*) It was Hancock's homestead at the time, as is found by both courts below and practically admitted by the appellant.

Appellant expressly states in his brief, page 29, as follows:

"In fact, our theory of this case is that Hancock and wife had a homestead in a part of the lots in controversy on the date of Hancock's mortgage, November 10, 1883, and on the date of the commencement of the Herrick and Luhrs suit, and retained that homestead until the act of the legislature of Arizona went into force in 1887."

Even without this admission this court would accept as final the finding of the supreme court of Arizona on this subject (Young *vs.* Amy, 171 U. S., 179).

The Arizona statute establishing the homestead, which was in force at the time of the deed from Hancock to his wife, read as follows:

Compiled Laws of 1877, *Section* 2140.

"The homestead, consisting of a quantity of land, together with the dwelling-house thereon and its appurtenances and the water rights and privileges pertaining thereto, sufficient to irrigate the land, not exceeding in value the sum of five thousand dollars, to be selected by the owner thereof, shall not be subject to forced sale or execution, or any other final process from a court, for any debt or liability contracted or incurred after thirty days from the passage of this act, or if contracted or incurred at any time in any other place than in this Territory."

(*b.*) That this property was Hancock's homestead at the time of the deed from him to his wife was *res adjudicata* as to the parties to this suit at the time of the trial.

The judgment-roll in the case of Herrick & Luhrs against W. A. and Lilly B. Hancock, which was put in evidence by the plaintiff in the present case (37), shows that that action was commenced on September 21, 1885, for the purpose of foreclosing two mortgages on the property now in question, one mortgage having been made by Hancock alone on November 10, 1883, this covering four of the five lots, and the other having been made by Hancock and wife on December 17, 1883, covering all of the lots. In this case the defense set up to the first mortgage was that the property on which it was given, together with the additional lot, constituted the homestead of Hancock, and that therefore the mortgage was void because not signed by Hancock's wife. The plaintiffs replied to this that the one lot not covered by the mortgage was Hancock's homestead, but the lots covered by the mort-

gage were not. This was therefore the precise point in issue in that action, whether these four lots were held by Hancock as his homestead, in addition to the one lot which was admittedly so held by him.

The judgment in that action did not foreclose this mortgage executed by Hancock alone. There can be no question but that this was on the ground that the property was Hancock's homestead, since that was the direct and only point raised in the case. By this judgment it therefore became *res adjudicata* that on November 10, 1883, and on September 21, 1885, this property was the homestead of Hancock.

On this point of *res adjudicata* we desire to call attention to the case of Southern Pacific R'y *vs.* United States, 168 U. S., at pages 48 *et seq.*, where it is said:

"The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined, must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."

The parties were substantially the same in the former suit as they are in the present case. True, the appellee herein was not a party to that former suit; but his predecessor in interest, Lilly B. Hancock, was, and he, as her privy, is entitled to set that judgment up as *res adjudicata*.

(*c.*) It was legal in Arizona at the time of the deed from Hancock to his wife for a husband to deed a homestead to his wife without his wife signing the deed.

The appellant contends that this deed from Hancock to his wife was void if this property was Hancock's homestead

at the time of that deed, because the deed was not signed by Mrs. Hancock herself; and in this connection appellant quotes the statute of Arizona relating to the transfer of homesteads, which was in force at the time of this conveyance and which reads as follows:

Par. 2141, *Compiled Laws of* 1877.

"* * * no mortgage, sale or alienation of any kind whatever of such land (the homestead) by the owner thereof, if a married man, shall be valid without the signature of the wife to the same, acknowledged by her separately and apart from her husband."

Our contention on this matter is that that law was enacted for the benefit of the wife, to prevent the husband from depriving his wife and family of their home, but that the statute was not intended to and does not have any application to the case of a transfer by the husband to the wife herself, as the reason for the enactment of the statute is in that case lacking, and in fact strict compliance with the words of the statute in that case would be in direct violation of the spirit of the statute, which is to, as far as possible, secure the homestead to the wife. This being the case, we do not believe that it should be or will be held that the wife should join in the deed of the homestead to herself.

The following authorities support our view of this matter:

Thompson on Homesteads and Exemptions, section 473:

"The policy of those statutes which restrain the alienation of the homestead without the wife joining in the deed is to protect the wife, and to enable her to protect the family, in the possession and enjoyment of a homestead, after one has been acquired by the husband. They are not intended to interpose obstacles in the way of a conveyance of the homestead to the wife, or to the wife and children, with the consent and approval of the wife, whatever may be the form of such conveyance."

In California, from which the Arizona homestead law was taken, the courts have held that the statute requiring that the wife should sign a deed of the homestead did not apply to the case of a deed of the homestead from husband to wife.

Burkett *vs.* Burkett, 78 Cal., 310; 20 Pac., 715:—

"A conveyance by the husband to the wife is valid and passes the complete title to the wife of said homestead, though secs. 1242–1243 provide that an instrument of conveyance of the homestead must be executed and acknowledged by both husband and wife."

In many other States, under similar statutes, it has been held that the husband can convey a homestead to the wife without her joining in the deed.

Stevens *vs.* Castel (Michigan), 29 N. W., 828.
Lynch *vs.* Doran (Michigan), 54 N. W., 882.
Harsh *vs.* Griffin (Iowa), 34 N. W., 441.
Reihl *vs.* Bingenheimer (Wisconsin), 28 Wis., 84.
Ferguson *vs.* Mason (Wisconsin), 60 Wis., 377.
Holmes *vs.* Carley, 31 N. Y., 289.
Furrow *vs.* Athley (Nebraska), 33 N. W., 208.

In the case of Johnson *vs.* Branch (South Dakota), 68 N.W., 173, the court expresses the idea clearly, saying:

"As statutes inhibiting the alienation or encumbrance of the homestead without the concurrent assent of the husband and wife, evidenced by an instrument in writing, executed by both and duly acknowledged, emanate from a regardful consideration of the reciprocal duties, and are designed only to protect the home and family against the vicissitudes of fortune and the ravages of time and events, the spirit of such laws is not contravened by the conveyance direct from the husband to the wife, and it is useless for the husband and wife both to join as grantors in such a deed."

In support of his position, and as opposed to the contention of the appellee, the appellant has cited several cases from Illinois, which hold that under a statute providing

that a husband shall not convey a homestead without his wife joining in the conveyance, the husband cannot even convey to his wife, unless the wife also signs the deed to herself.

The Illinois cases which so hold begin with the case of Kitterlin *vs.* Milwaukee Mechanics' Insurance Company, 134 Ill., 647. It will appear upon an examination of the facts of this case that it was one of those "hard cases" which make "hard decisions." The facts were as follows: The husband insured his homestead, one of the conditions of the policy being that if any change should occur in the title to the property the policy should be void. Some time afterward the husband made a deed of the property to his wife, his wife not joining in the deed. After this conveyance was made, a fire occurred and destroyed the property. The insurance company defended the action on the policy on the ground that the condition of the policy that no change should be made in the title to the property had been violated by the deed from husband to wife. The court, however, in order to sustain the insurance against the company, held that the statute against the conveyance of the homestead by the husband without the wife's joining should be strictly construed to apply to the case, and held the deed void, and the company liable on this ground.

Every similar case since that time in Illinois has referred to this original case and founded its decision on that case on the ground that the law had been settled.

On the contrary, in every other jurisdiction where the question has arisen the contrary idea has prevailed, as shown by the authorities we have quoted above. The decision in the case of Castle *vs.* Palmer (Mass.), 6 Allen, 403, which is cited by the appellant, goes only to the proposition that where the homestead has been deeded by the husband to the wife it does not lose its character of homestead, so as to be subject to execution. None of the other authorities cited by the ap-

pellant have any bearing whatever on the question of a conveyance of a homestead by a husband to his wife.

3. This deed from Hancock to his wife was a valid deed, because it was not in fraud of creditors, because as this property was Hancock's homestead his creditors could have had no recourse against it, even if not transferred by him to his wife; hence they lost nothing by the transfer.

Our contention on this proposition is that as this property was the homestead of Hancock at the time he made the deed to his wife, it would not have been subject to the claim of any of his creditors, and therefore the creditors could not be injured in any way by his transfer of it, and that transfer of the property was not fraudulent.

We have above quoted the homestead law which was in force in this Territory at the time of the conveyance from Hancock to his wife, section 2140, Compiled Laws of 1877, which provides that such property shall be exempt from execution or any liability whatever.

The following authorities hold that the transfer of such exempt property cannot be fraudulent:

Bump on Fraudulent Conveyances, page 242:

"Property which is exempt by positive statute from liability for the owner's debts is not susceptible of a fraudulent alienation, and consequently is not within the statute. The creditors cannot be said to be creditors as to that particular property so as to make a transfer of it a matter of concern to them. The debtor, as to that property, may be considered as without creditors, and he has the right to dispose of it as though he had no creditors. He may sell it and purchase another piece of property with the proceeds and have the latter conveyed to his wife."

Hickson *vs.* George, 18 Kansas, 253:

"A debtor, in the disposition of his property, can commit a fraud upon his creditor only by disposing of such of his property as the creditor has a legal right to look to for his

pay. Now, if George ever had any interest in said property, he disposed of that interest long before he abandoned the property as his homestead by having the absolute and unconditional title thereto placed in his wife's name and having the deed to her for the property recorded. There was no fraud in this."

Other authorities to the same effect are:

Monroe *vs.* May, 9 Kansas, 476.
Dreutzer *vs.* Bell, 11 Wis., 114.
Pike *vs.* Miles, 23 Wis., 164.
Cipperly *vs.* Rhodes, 53 Ill., 346.

In the case of Blair *vs.* Smith, 15 N. E., 817, the court, in discussing this question, says:

"Property exempt from execution is not subject to any claim of the creditor, but is absolutely free from all claims of creditors. No execution or other writ is a lien upon it. The creditor has no claim upon it in any form, and it is impossible to conceive any logical ground upon which property not subject to the claims of creditors can be held to have been fraudulently conveyed."

Taylor *vs.* Duesterberg, 109 Ind., 165; 9 N. E., 907.
Patnode *vs.* Darvau, 71 N. W., 1095 (Mich.).
Bank of Commerce *vs.* N. W. Bank, 67 N. W., 423 (Wisconsin).
Hibben *vs.* Soyer, 33 Wis., 319.
Thompson *vs.* Crane, 73 Fed., 327.
Mundt *vs.* Hagedorn, 68 N. W., 610 (Nebraska).
Munson *vs.* Carter, 58 N. W., 931 (Nebraska).
Merchants' Bank *vs.* Kopplin, 42 Pac., 263 (Kansas).

Exempt property may be transferred by the owner, even as a gift to his wife, free from any claims of his creditors.

Bailey *vs.* Little, 53 Pac., 308 (Nevada).
Waugh *vs.* Bridgeford, 28 N. W., 626.
Robb *vs.* Brewer, 15 N. W., 420.
Isgrigg *vs.* Pauley, 47 N. E., 821 (Indiana).
Bank of Blagden *vs.* David, 74 N. W., 42 (Nebraska).

On principle and authority, it would seem to be clear that this deed from Hancock to his wife was not void as being in fraud of creditors.

Certainly it was admissible in evidence, and that is the only ruling in regard to it which is before this court.

II.

The evidence which was excluded as to an application made by Hancock for a homestead in 1888 *was clearly irrelevant.*

Since the title to the property passed from Hancock to his wife in 1886, so that Hancock had no legal interest in it in 1888, it could make no possible difference what land he was claiming in 1888 or how he was claiming it. Evidence of Hancock's attempting to take out a homestead at the time of the deed to his wife might have been relevant as showing that the property was not his homestead at the time of that conveyance, which was one of the points in issue in the case, but his attempt to claim other lands as a homestead in 1888 can certainly have no bearing on this case, which turned on the question whether Hancock had conveyed the property involved in this suit to his wife in 1886.

The rights of a grantee under a valid deed cannot be impaired by the subsequent declarations or acts of the grantor.

III.

There was no error in refusing to allow the appellant to introduce the evidence which he offered as to the insanity of Hancock's wife.

The offers of the appellant as to proving the insanity of Mrs. Hancock are contained in the certificate of the Arizona supreme court (Transcript, pages 97 and 98). It appears

from this certificate that the appellant offered to prove that on March 23, 1886, and March 21, 1886, Lilly B. Hancock was insane. (See also page 33, Transcript.)

The deed from Hancock to his wife was made on February 26, 1886, almost a month before this time. This testimony would be clearly irrelevant, as far as having any tendency to show that Mrs. Hancock was insane at the time the deed of the property was made to her by her husband. The showing that at one time a status existed will not have any tendency to show that it existed prior to that time; in other words, a presumption is not retrospective.

Jones on Evidence, sec. 54.
Erskine *vs.* Davis, 25 Ill., 228.
Taylor *vs.* Cresswell, 45 Md., 422.
Murdock *vs.* State, 68 Ala., 567.

2. There was no error in rejecting this evidence as to Mrs. Hancock's insanity, because even if she had been insane at the time of the deed to her from her husband, she would have been competent to take that deed, and the deed would have been valid.

The transaction was one beneficial to Mrs. Hancock. Nothing was being taken from her. Can there be any question but that, even if she were insane at the time, the deed to her would be perfectly valid?

Chief Justice Shaw said in the case of Concord Bank against Bellis *et al.*, 10 Cush., 278:

"A good conveyance may be made by deed-poll to an infant, lunatic, or *feme covert*, although such grantee would be under legal disability to make a conveyance."

Wharton on Contracts, vol. 1, p. 139, par. 107*a*:

"'A man of non-sane memory,' it is said by Coke, 'may, without the consent of another, purchase lands;' and 'idiots, madmen, lepers, deaf, dumb, and blind, minors, and all

other reasonable creatures, have power to purchase and retain lands and tenements.' By deed-poll a title can thus be granted to a lunatic."

Campbell *vs.* Kuhn, 45 Mich., 513, is also an authority on this point.

3. There was no error in rejecting this evidence as to Mrs. Hancock's insanity, because, even if the deed to her were not absolutely effectual, it would only be voidable at her option, and not be subject to attack by a third party.

If, for the reason that Mrs. Hancock was insane at the time the deed was made to her by her husband, that deed could be assailed, it could only, and that only at the utmost stretch, be held voidable. The rule is too elementary to require citation of authorities, that a deed given *by* an insane person is not void, but only voidable, and so, *a fortiori*, a deed *to* an insane person at the most could only be held voidable.

Now voidable means that it can be avoided only by the person to whom it is given, or some one standing in his or her shoes. The present case is entirely different; here a third party, who has acquired an alleged claim to the property through another channel, is trying to impeach the conveyance to the alleged insane person, in order to recover in this ejectment suit against the privy and successor of that alleged insane person.

The point we are making is clearly brought out in Dembitz on Land Titles, vol. 1, page 420, as follows:

"The distinction between void and voidable has three consequences: * * * second, parties not claiming under the infant cannot impeach the conveyance (for instance, if the infant's grantee brings ejectment against an intruder, the latter cannot plead an outstanding title in the infant grantor)." (Citing cases.)

Washburn on Real Property, vol. 3, pp. 264, 265 (5th ed.):

"But an infant cannot avoid a deed made by him while he remains an infant, nor can any one but himself or his heirs call the deed in question."

This being the law, this deed from Hancock to his wife can be avoided, if at all, only by Mrs. Hancock.

4. There was no error in rejecting this evidence as to Mrs. Hancock's insanity, because, even if Mrs. Hancock were insane at the time she and her husband executed the mortgage to Alstatter, through the foreclosure of which the appellee has acquired his title, such mortgage could only be overthrown at the option of Mrs. Hancock or her representatives; and it would not be subject to be overthrown, together with the judgment of foreclosure rendered upon it, in this collateral attack on that judgment.

The same reason and authorities apply to this proposition that we have cited under the one immediately preceding. Even if Mrs. Hancock were insane at the time of the execution of the mortgage to Alstatter, under foreclosure of which the appellee claims, the appellant, an outsider, cannot now avoid that mortgage made by Mrs. Hancock; if the mortgage were avoidable at all, it would only be by Mrs. Hancock or some one claiming under her.

Ingraham *vs.* Baldwin, 9 N. Y., 45, is an analogous case. In that case a person in good faith purchased land at a sale under proceedings to foreclose a mortgage, and brought an action for possession against the tenant of the premises who was not the mortgagor; it was held that it was incompetent for the defendant to show that the mortgagor was of unsound mind when the mortgage was executed.

See also Kilbee *vs.* Myrick, 12 Fla., 419.

And for another reason the appellant could not now attempt to show the insanity of Mrs. Hancock for the purpose

of avoiding this mortgage made by her to Alstatter, because this mortgage has been properly foreclosed by suit (Transcript, pages 70 *et seq.*), and the judgment rendered in that suit foreclosing that mortgage cannot be collaterally attacked in this ejectment suit on the ground that Mrs. Hancock was insane.

Van Fleet on Collateral Attack, par. 616.

"Where a judicial record is fair on its face, it cannot be shown, collaterally, that any party was insane at the time the proceeding was commenced or judgment rendered, because that will contradict the record."

If Mrs. Hancock were insane at the time she made the mortgage to Alstatter, she could have disaffirmed it at any time after that. She did not disaffirm it, and suit was brought to foreclose the mortgage, she being a party to the suit and answering therein (Transcript, page 86), admitting the execution of the mortgage. The judgment of foreclosure is clear on its face. It would surely be binding unless Mrs. Hancock were insane during the action and when judgment was rendered, and under the law this cannot be shown by way of collateral attack on that judgment.

Foster *vs.* Jones, 23 Ga., 168.
Speck *vs.* Pullman Car Co., 121 Ill., 33.
Maloney *vs.* Dewey, 127 Ill., 395.
Woods *vs.* Brown, 93 Ind., 164.
Boyer *vs.* Berryman, 123 Ind., 451.
Stigers *vs.* Brent, 50 Md., 214.
Heard *vs.* Sack, 81 Mo., 610.
McCormick *vs.* Paddock, 20 Neb., 486.
Lamprey *vs.* Nudd, 29 N. H., 299.
Brittain *vs.* Mull, 99 N. C., 483.
Henry *vs.* Brothers, 48 Pa. St., 70.
Wood *vs.* Bayard, 63 Pa. St., 320.
Grier's Appeal, 101 Pa. St., 412.
Denni *vs.* Elliott, 00 Tex., 337.

5. There was no error in rejecting this evidence as to Mrs. Hancock's insanity, because even if Mrs. Hancock were insane, and it should be held in this proceeding that the mortgage executed by her to Alstatter was void, the plaintiff could not recover in this case, as, it being an action of ejectment, the plaintiff (never having been in possession) must recover on the strength of his own title, and even if the title should not be in the appellee, it would still be in Mrs. Hancock under the deed to her from her husband, and the appellant, claiming through an execution against the property of the husband alone, could not recover in this action.

The proposition just stated seems self-evident. Even if the appellant could succeed in establishing the fact that the mortgage from Mrs. Hancock to Alstatter was absolutely void, the title to the property would still be left in Mrs. Hancock herself, and we do not see how the appellant, who must recover on the strength of his own title, would be benefited, as he would only have his judgment against Hancock alone, which would not be effective against Mrs. Hancock's property.

We submit that the court made no error in ruling out all the testimony sought to have been introduced by the appellant bearing on the question of the sanity of Mrs. Hancock.

The foregoing, as we conceive, are the only questions properly brought here for review.

There is no other exception certified here as to the rulings of the trial court admitting or excluding evidence. It has not been suggested, and it would seem that it is impossible to suggest, that if the facts be as found by the supreme court of Arizona (99), this appellee, Pemberton, was not entitled to judgment in his favor.

We submit, however, certain other considerations in reply to the brief for the appellant.

IV.

Even if the deed from Hancock to his wife was fraudulent, as charged, it would be only voidable until set aside in a proper proceeding; and if in the meantime, before action had been brought to set it aside, the grantee in the deed had (as in this case) mortgaged the property to a bona fide mortgagee, such bona fide mortgagee would stand prior to any creditor of the fraudulent grantor or purchaser at such creditor's sale, notwithstanding that the judgment might have been standing against the fraudulent grantor at the time of the mortgage to the bona fide mortgagee. On this principle appellee now stands prior to appellant in any event.

We believe that the rule of law is clearly established that where a person has alienated his land by conveyance which is claimed to be a fraud upon his creditors, and afterward a judgment is recovered against him, such judgment does not attach as a lien upon the land until the commencement of an action by the judgment creditor to set aside the conveyance; this being on the ground that the conveyance is not void *ab initio*, but is only voidable, and that it is valid between the parties and as to the judgment creditor until attacked, and if while the property still remains in the hands of the fraudulent grantee, and before any action has been brought to set aside the deed to him, it passes from him into the hands of some *bona fide* purchaser, such *bona fide* purchaser is vested with good title thereto, even as against former creditors, judgment or otherwise, of the fraudulent grantor, as such creditors' judgments would only be a lien on the property from the date of the commencement of an action by them to set aside the deed as fraudulent.

If this is the rule, as we contend, then, even if the deed from Hancock to his wife was fraudulently made, so that

it would, in a proper proceeding, have been set aside, no such proper proceeding to set it aside having been ever brought, it is still valid as to all the world; and the property having passed by virtue of a *bona fide* mortgage, made before execution was levied by appellant on the property, which mortgage was foreclosed and the property sold, from the alleged fraudulent grantee, Mrs. Hancock, to the appellee, the appellee now stands absolutely vested with the prior right to that property.

The statute of Arizona (in force at the time of appellant's recovery of judgment against Hancock) providing on what real estate a judgment shall be a lien reads as follows:

Act 50, *Laws of Arizona of* 1891, *Section* 4.

"Every such judgment, when so docketed (by the clerk of the court) shall, for a period of five years from the date of the rendition thereof, be a lien on the real property in the county where the same is docketed, except the homestead of every person against whom such judgment shall have been rendered and docketed, and which he may have at any time thereafter within said period of five years."

The effect of this statute is to make the docketed judgment a lien on the property of the judgment debtor. Property which he has conveyed away by a deed, valid and binding on himself, cannot be regarded as his property until an action is commenced to annul the deed from him. It is on this theory that the courts have held that the judgment did not become a lien on real property fraudulently conveyed away by a judgment debtor until an action was commenced to set aside the deed.

We would suppose that the same rule would apply to the execution on the property, and that the execution would no more constitute a lien than the judgment until the voidable deed had been attempted to be avoided by the commencement of an action to set it aside; but that is immaterial in

this case, as the mortgage to Alstatter, while made subsequent to the judgment of appellant against Hancock, was made prior to appellant's execution and levy on the property under that judgment.

In the case of *In re* Estes & Carter, 3 Fed. Rep., 134, Judge Deady reviews the authorities pro and con and arrives at the following conclusion:

"In my own opinion, the lien of a judgment which is limited by law to the property of or belonging to the judgment debtor at the time of the docketing does not, nor cannot, without doing violence to this language, be held to extend to property previously conveyed by the debtor to another, by deed valid and binding between the parties. A conveyance in fraud of creditors, although declared by the statute to be void as to them, is nevertheless valid as between the parties and their representatives, and passes all the estate of the grantor to the grantee; and a *bona fide* purchaser from such grantee takes such estate, even against the creditors of the fraudulent grantor, purged of the anterior fraud that affected the title."

The case of Milier *vs.* Sherry, 2 Wall., 237, supports the same position, as does also the case of Brooks *vs.* Wilson, 6 N. Y. Supp., 116, where (on page 119) the court says:

"With what propriety can it be said that a judgment debtor 'has' property which he has conveyed away? It is claimed that the statute which avoids conveyances made with intent to defraud creditors rendered the conveyance of Michael K. Wilson, the judgment debtor, a nullity as respects his creditor, and, therefore, that judgments against him become liens on the property conveyed, as if no conveyance had been made. The answer to this argument is that the fraudulent conveyance is not void, but is voidable only, at the election of the creditors defrauded. The fraudulent grantee can transfer the title to the property conveyed to a *bona fide* purchaser, notwithstanding outstanding judgments against the fraudulent grantor docketed before the transfer."

Other authorities to the same effect are:

Bump on Fraudulent Conveyances, sec. 581 (4th ed.).
1 Black on Judgments, sec. 423.
Lyon *vs.* Robbins, 46 Ill., 276.
Rappelye *vs.* International Bank, 93 Ill., 396.
Neil *vs.* Foster, 36 Fed. Rep., 29.
Ackley *vs.* Chamberlain, 16 Cal., 181.
Young *vs.* Lathrop, 12 Am. Rep., 603 (N. Carolina).

This being the law, it follows that the appellant obtained no lien on the property in question at the date of his judgment, to wit, March 5, 1892, and that the appellee has the prior lien on the premises, because the mortgage, under the foreclosure of which he claims, was made March 21, 1892, from which date his lien commences. The appellant has never commenced any action to set aside the deed from Hancock to his wife, so that we do not believe he has ever acquired any lien on the property; but even if by his levy on the property and sale of it he acquired any lien upon it, that levy was not made until April 3, 1892, and is therefore subsequent to the appellee's claim founded on the mortgage of March 21, 1892.

Therefore, even if it should be held that Hancock did not hold this property as his homestead when he conveyed it to his wife, or that for any other reason that conveyance was fraudulent or voidable, nevertheless the appellee clearly has the prior lien on the premises.

V.

Any claim appellant might have is barred by the statute of limitations. (This includes argument on the remaining errors assigned by appellant.)

1. An action of ejectment in Arizona must be brought within three years after the cause of action accrues.

Revised Stats. of Arizona, section 2297:

"Every suit to be instituted to recover real property as against any person in peaceable and adverse possession thereof under title or color of title, shall be instituted within three years next after the cause of action shall have accrued and not afterward."

2. Appellant's cause of action accrued on January 2, 1893, because a cause of action accrues by virtue of a sheriffs sale on execution when the right to the deed is complete, which in this case was on that date.

The sale to appellant on the execution against Hancock, on which sale appellant obtained his deed to the property, took place on July 2, 1892. The law is that the purchaser at an execution sale is entitled to a deed to the property which he purchases at the expiration of six months from the time of the sale.

Act No. 20, Laws of Arizona of 1889.

"SECTION 22. * * * If no redemption be made within six months after the sale (execution sale), the purchaser or his assignee is entitled to a conveyance."

The appellant was, therefore, entitled to a conveyance of the property on January 2, 1893, six months from the time it was sold to him at the execution sale.

We contend that the law is that the statute of limitations runs from the time the plaintiff has it in his power to make his cause of action complete, and that he cannot voluntarily delay its operation, and so extend the time within which he can sue by neglecting to perfect his right; that the statute runs from the time when he could have perfected his cause of action, irrespective of the time when he does perfect it.

This is the view taken in the case of Cook *vs.* Norton, 48 Ill., 20, which is quoted with approval as to this point in

Pratt *vs.* Pratt, 96 U. S., 709. Another case which takes the same view is Cowles *vs.* Coffey, 88 N. C., 340.

On this principle it has been held that the statute of limitations commenced to run against one claiming under a tax deed from the time when the party holding the deed was entitled to obtain it, and not from the date of the actual execution and delivery of the deed.

Hintrager *vs.* Hennessy, 46 Iowa, 600.

In the case of Hintrager *vs.* Traut, 27 N. W., 807, the holding was the same, and the court said:

"His (the plaintiff's) right was complete to a deed, so far as all acts and proceedings were concerned, except his own act, over which he had no control. The law, as it were, offered him the deed at the time, but he would not stretch forth his hand to receive it. * * * Surely a plaintiff cannot indefinitely prolong the time in which he may sue by voluntarily failing to do the things required by the law to be done before an action may be brought."

The Supreme Court of the United States, in a case which seems analogous to the one at bar in this respect, has stated the same principle, that where the completion of a legal right depends upon some act of a party, that party cannot, by failing to complete his right, suspend the running of the statute of limitations until he has completed it, but the statute will run from the time he could have by the act of his own completed his right.

Kirby *vs.* Lake Shore R'y, 120 U. S., 130.

In that case to perfect the right of action all that was necessary was that a certified copy of letters testamentary issued in another State should have been filed in Illinois. This the plaintiff neglected to do, and on this point the court says:

"* * * a certified copy deposited in the office of the surrogate was all that was required. As this was in the ex-

ecutor's power to have done at any time, he can hardly claim that his own voluntary delay should extend the period which equity considers reasonable for the institution of a suit."

Other authorities on the same point are—

Steele's Administrators *vs.* Steele, 25 Pa. St., 154.
Palmer *vs.* Palmer, 36 Mich., 487.

3. If appellant's cause of action did not accrue on January 2, 1893, it certainly did accrue when the appellant took his deed from Sheriff Murphy, which was on January 4, 1893.

(*a.*) This is so, because Murphy, the sheriff then in office, was the proper officer to make the deed. Hence there was no error in admitting this deed in evidence, as it tended to show when the appellant's cause of action accrued.

Murphy was the sheriff who was in office at the time the deed was due to the appellant, he having succeeded Montgomery, who was the sheriff who made the sale to appellant.

We believe that under the statutes of Arizona the sheriff in office at the time the deed is due to the party holding the certificate of sale is the proper officer to execute the deed on that certificate, and that the outgoing sheriff's right to execute the deed ceases with his relinquishment of the office.

We are aware that the California supreme court, in the case of People *vs.* Boring, 8 Cal., 407, has held that the former sheriff should make deed to the property sold by him; but that opinion is founded expressly upon a California statute, to which Judge Field, in rendering the opinion of the court, thus calls attention:

"The fifth subdivision of section 37 of the act concerning sheriffs, requires, on the election of a new sheriff, the former sheriff to deliver over to his successor all executions, attachments and final process, except those which he has executed or begun to execute by the collection of money or a levy on property; and the 39th section of the same act provides,

that, notwithstanding the election and qualification of the new sheriff, the former sheriff shall complete the execution of all final process which he began to execute."

A very similar statute was in force in this Territory up to 1887, when it was repealed; that statute read as follows:

Compiled Laws of 1877, *Section* 93, *Page* 47.

"Notwithstanding the election of a new sheriff, the former sheriff shall return, in his own name, all writs of capias, all other original process, all attachments, and all executions which he shall have fully executed; and shall proceed to complete the execution of all final process and attachments which he shall have begun to execute by a collection of money thereon, or by a levy on property in pursuance thereof."

This statute was, however, as stated, repealed in 1887; and in the latter year the legislature passed a law relating to all county officers, including sheriffs, and providing as follows:

Revised Statutes of Arizona 1887, *Section* 487.

"In case of the death, resignation or removal of any officer, leaving unperformed any duty imposed by law, it shall be the duty of his successor in office to do and perform such act, and to complete all unfinished business."

We contend that it was the object and intention of the legislature in passing this statute (and repealing the other) to transfer the authority to transact all unfinished official business to the successor in office.

Under a similar statute in South Carolina, the supreme court of that State, in the case of Martin *vs.* Wilbourne, 2 Hill, 395; 27 Am. Dec., 393, in construing the statute, which used the words "or be removed from office," which correspond to the words in the Arizona statute quoted above, "or

removal of any officer," held that such a statute applied to an officer who had been removed from office and to an officer whose term of office had expired by operation of law. The court said on this point:

"The principal reason is that the necessity and propriety of the provision exist in the case of a sheriff's going out of office by the expiration of his term in as great a degree, and indeed in a much greater one, than when he is removed on impeachment or resigns. * * * If there was any incapacity in the sheriff to convey when he was removed on impeachment, or at all events when he had resigned, or any inconvenience in requiring or permitting him to do so, the same incapacity or inconvenience existed when he was out of office by the expiration of his term; and the necessity of legislative interference existed in a much greater degree, as it was a case of much more frequent occurrence. When the terms of the act may be made to embrace both the greater and lesser evil, should we be justified in restricting it to the latter?"

We contend that the same reasonable construction should be placed on the Arizona statute, and that under it Sheriff Murphy was the proper officer to execute the deed to the appellant on his certificate of sale made to him by the former sheriff, Montgomery.

In the State of Oregon, where, so far as we are able to ascertain, there is no statute on the subject, one way or the other, the supreme court has held that the sheriff in office at the time the certificate is produced and the deed demanded is the proper officer to make the deed, and not the one whose term of office has expired, although he may have made the sale before his office expired.

Moore *vs.* Locks Co., 7 Oregon, 359.
Faull *vs.* Cooke, 26 Pac., 662.

At common law there was no right of redemption from a sheriff's sale. The deed passed at once. But where, as in Arizona, there is by statute a period of six months for re-

demption from such a sale, we can see no reason why the sheriff who made the sale and has since gone out of office should make the deed, particularly in view of the statute of Arizona requiring all officers to complete all unfinished business of their predecessor in office.

We submit, therefore, that the deed from Murphy to appellant was properly admitted in evidence, and that the statute of limitations surely began to run against the appellant on January 4, 1893, if not on January 2, 1893.

(*b.*) But, further, appellant's cause of action accrued on January 4, 1893, even if Murphy were not the proper officer to give the deed and the former sheriff was.

We maintain this proposition on the ground of reason. Appellant took his deed from Murphy on January 4, 1893, had it recorded the same day, and showed that he relied on this deed at that time as establishing his title. Appellant's mistake of law at that time, if it was a mistake, in taking the deed from Murphy, instead of from the former sheriff, should not be allowed to postpone the running of the statute until such time as he did take a deed from the former sheriff, to the prejudice of the appellee.

Suppose the appellant had not taken the deed from the former sheriff until the three years from the date of his taking his first deed from Murphy had almost expired, would the statute have then only commenced to run from the latter date? We do not believe such to be the just or the legal rule.

We submit, therefore, that appellant's cause of action accrued to him on January 4, 1893, if it did not accrue on January 2.

4. Appellee was in peaceable and adverse possession of the property in dispute under title or color of title for more than three years after the appellant's cause of action accrued—*i. e.*,

either January 2 or January 4, 1893—and prior to the institution of this suit by the appellant, to wit, February 1, 1896.

As appears from the record in the case, Mrs. Hancock, who had title or color of title to the property by virtue of the deed to it from her husband, which had been recorded, as required by law, to become notice to the world of her title, and was in possession of the property continuously from January 2, 1893, up to March 5, 1896, when the appellee was put in possession by virtue of his deed to the property made in pursuance of the sale of the property to him on the foreclosure of the Alstatter mortgage. The appellee has, therefore, a privity of estate with Mrs. Hancock, being her successor in interest. We claim that this possession for this period by Mrs. Hancock and the appellee is such adverse possession as is contemplated by the statute which we have above quoted, and that any claim appellant might have had is therefore barred.

The whole argument of appellant on this point is directed to the proposition that the person in possession of the land during this period of time was Hancock and not Mrs. Hancock.

Hancock had deeded the property to his wife, and the deed had been duly recorded. The rule is that where a husband conveys land to his wife by a valid deed as between the parties, which has been duly recorded, and both parties continue to reside on the land, the possession is that of the wife and not that of the husband.

Reagle *vs.* Reagle (Penn.), 36 Atlantic, 191.

"The deed (from husband to wife), when recorded, was notice of her title, and thenceforth the possession of the land was as effectually hers as if she had owned it when they entered and made their home upon it."

There can be, it seems to us, no doubt that Mrs. Hancock was in possession of this property, and that the possession was not that of her husband.

On the theory that Hancock was in possession of the property and not Mrs. Hancock, appellant argues that Hancock's possession after the sale to appellant was not adverse to appellant for the reason that the possession of a judgment debtor is not adverse to the purchaser at an execution sale.

Even supposing the possession was Hancock's, the appellant's case must fail.

In support of his contention he has cited the case of Cook *vs.* Norton, 48 Ill., 22. Upon an examination of that case, it will be seen that on this point it merely contains certain *dicta*, and not a decision. It was said in that case that a debtor could no more claim adverse possession against the purchaser at a sale on execution than he could against his grantee. Conceding this to be true, we think the rule is that a grantor who conveys land by warranty deed may take adverse possession of the property conveyed as against his grantee.

Garabaldi *vs.* Shattuck, 11 Pac., 778:

"There can be no doubt that a grantor, even with a covenant of warranty, may, after his deed is delivered, take adverse possession of the property conveyed, and if his possession is allowed to continue during the period prescribed by the statute of limitations, obtain a title as against his grantee."

To the same effect are—

Franklin *vs.* Dorland, 28 Cal., 180.
Sherman *vs.* Kane, 86 N. Y., 57.
Traip *vs.* Traip, 57 Me., 268.
Dorland *vs.* Magilton, 47 Cal., 485.

Even if the possession from January 2 or January 4, 1893, the date of the accruing of plaintiff's cause of action, to

February 1, 1896, when he brought this action, was in Han
cock himself, we believe that the appellant's cause of actio
would be barred by the statute of limitations.

We submit that the judgment of the supreme court o
Arizona should be affirmed.

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